BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01 of WHISTLING RIDGE ENERGY, L.L.C. for WHISTLING RIDGE ENERGY PROJECT	FRIENDS OF THE COLUMBIA GORGE'S RESPONSE TO PETITIONS FOR RECONSIDERATION ORAL ARGUMENT REQUESTED

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I. Introduction

Intervenor Friends of the Columbia Gorge, Inc. ("Friends") continues to recommend denial of the proposed Whistling Ridge Energy Project ("WREP" or "Project"). The Application and Project do not comply with the applicable law. Not only did the Applicant fail to submit a legally sufficient Application in the first place, it has failed since then to supplement or revise the Application to correct the numerous deficiencies that have come to light via the SEPA and adjudicative processes.[1] The Council should reject the Applicant's approach of cutting corners, and should either recommend denial of the Project or recommend that the Applicant be given a final opportunity to remedy the defects in the Application prior to a decision—particularly the sections of the Application involving alternatives, wildlife, aesthetics, recreation, historic and cultural preservation, land use, transportation, noise, and socioeconomic impacts.

Four Petitions for Reconsideration have been filed by parties other than Friends. Friends opposes the Petition filed by the Applicant, as well as the Petition filed by Skamania County and the Klickitat County Public Economic Development Authority (collectively, "Skamania County" or "County"), and will respond to these Petitions below. Friends responds generally to Seattle Audubon Society's Petition by noting that many of Seattle Audubon's claims regarding the potential wildlife and habitat impacts of the Project are similar to those raised by Friends. Friends encourages the Council and Governor to act on these claims. Finally, Friends supports the Petition of Save Our Scenic Area ("SOSA"). Friends adopts SOSA's claims and arguments, and encourages the Council and Governor to act on these claims as well.

[1] The only exception has been the Applicant's amendment of the Application on October 12, 2009 to relocate the proposed "haul route" to comply with applicable law by removing all private road construction and use from the National Scenic Area. The Applicant relocated the proposed route in response to two appeals filed with the Columbia River Gorge Commission by Friends and other parties.

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II. Response

A. The Applicant and County incorrectly assert that the Council based its findings, conclusions, and recommendations on the Scenic Area Act.

The Applicant and County argue that the Council based its findings, conclusions, and recommendations regarding the Project's impacts on aesthetic, cultural, heritage, recreational, and community resources[2] on the Columbia River Gorge National Scenic Area Act ("Scenic Area Act").[3] Applicant Pet. at 6–8, County Pet. at 5–9. To the contrary, the Council expressly announced that it was *not* basing its decisions on the Scenic Area Act, nor on the Act's implementing rules and standards. *See, e.g.*, Order No. 869 at 7 ("It would be improper to apply NSA standards to territory outside the NSA."); Order No. 868 at 1 ("The scenic and cultural heritage of the Columbia Gorge is a state and regional asset warranting protection from visual harm *independent of* the designation of portions of the territory as a National Scenic Area") (emphasis added), 21 ("[T]he scenic area standards have no application outside [the National Scenic Area.").

As the Council recognizes, the unique and magnificent Columbia River Gorge has existed for millions of years (long before adoption of the Scenic Area Act) and is an important part of our cultural heritage, *independent of* Congress's designation of a portion of the Gorge as a National Scenic Area in 1986. For tens of thousands of years, Native Americans have cherished the Gorge, and for hundreds of years, explorers such as Lewis and Clark, United States citizens, and visitors from abroad have recognized the Gorge as a national and international treasure. The Gorge's cultural heritage, recreational and tourism opportunities, and spectacular scenic views

[2] *See, e.g.*, Order No. 869 at 2, 7–8, 13–14; Order No. 868 at 1, 16–24, 37.
[3] 16 U.S.C. §§ 544–544p.

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remain as important today as ever. The many public resources that would be adversely affected by this Project include the Oregon National Historic Trail, the Lewis and Clark National Historic Trail, the Historic Columbia River Highway, and the Ice Age Floods National Geologic Trail.

The Scenic Area Act states that *nothing in the Act* creates buffers outside the Scenic Area and that *nothing in the Act* "*of itself*" affects projects outside the Scenic Area boundaries:

> *Nothing in this Act* shall . . . establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, *of itself*, preclude such activities or uses up to the boundaries of the scenic area or special management areas.

16 U.S.C. § 544*o*(a)(10) (emphasis added). This provision in the Act allows for *other sources of law* to protect the Gorge's aesthetic, cultural, recreational, and community resources, *independent of* the Scenic Area Act and regulations. And other sources of law do in fact require protection of these resources. These authorities include the Energy Facilities Site Locations Act ("Siting Act") at RCW 80.50.010(2)[4]; the Council's rules at WAC 463-14-020,[5] WAC 463-47-110(1)(a),[6] WAC 463-47-110(1)(b),[7] WAC 463-47-110(1)(d),[8] WAC 463-47-110(2)(b)(i),[9] and

[4] The Council must "preserve and protect the quality of the environment," "enhance the public's opportunity to enjoy the esthetic and recreational benefits of . . . air, water and land resources," and "pursue beneficial changes in the environment." RCW 80.50.010(2).

[5] The Council must, among other responsibilities, ensure that new energy "facilities will produce minimal adverse effects on the environment" and must protect "the esthetic and recreational benefits of the air, water and land resources." WAC 463-14-020.

[6] "The overriding policy of the council is to avoid or mitigate adverse environmental impacts which may result from the council's decisions." WAC 463-47-110(1)(a).

[7] "The council shall use all practicable means . . . [to] [f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations[,] . . . [a]ssure for all people of Washington safe, . . . aesthetically and culturally pleasing surroundings . . . [and] [p]reserve important historic, cultural, and natural aspects of our national heritage . . . ." WAC 463-47-110(1)(b).

[8] The Council must "ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." WAC 463-47-110(1)(d).

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WAC 463-64-020[10]; and the Skamania County Comprehensive Plan at Policy LU.3.1[11] and Policy LU.3.3.[12] The Council has recognized several of these authorities as the basis for its decisions and recommendations, and should recognize the remainder of them as well.

The Applicant and County insist that the Council *must have* based its decisions on the Scenic Area Act, even though the Council has stated otherwise. Applicant Pet. at 6–8, County Pet. at 5–9.[13] According to the Applicant and County, the reason why the Council relied on the Scenic Area Act is because many of the viewing areas from which the Council evaluated the Project's impacts are located "within the Scenic Area." Applicant Pet. at 7; County Pet. at 5. The Applicant and County conveniently ignore the fact that *the Applicant itself chose the viewpoints* from which the Project's scenic impacts were modeled and simulated. *See* Amended Application at fig. 4.2-5 (selecting 21 viewpoints, 17 of which are located inside the Scenic Area).[14]

Now, after selecting, analyzing, and modeling seventeen viewpoints inside the Scenic Area, the Applicant criticizes the Council for basing its decision on the likely impacts from these

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[9] "The council may . . . [c]ondition the approval or recommendation for approval for a proposal if mitigation measures are reasonable and capable of being accomplished and the proposal is inconsistent with the policies in subsection (1) of this section." WAC 463-47-110(2)(b)(i).

[10] The Council must "protect state or local governmental or community interests affected by the construction or operation of the energy facility." WAC 463-64-020.

[11] "Improvements, both public and private, should be made intelligently and efficiently, and have a wholesome effect upon the communities."

[12] "Encourage industry that would have minimal adverse environmental or aesthetic effects."

[13] According to the Applicant and County, the Council's statements that it did not rely on the Scenic Area Act are "disingenuous," "weak," and "an utterly transparent and ineffective attempt to circumvent Congress[]." County Pet. at 2; Applicant Pet. at 7 & n. 6.

[14] Friends and others requested analysis and modeling from additional viewpoints located outside the Scenic Area, including viewpoints to the northwest in the Gifford Pinchot National Forest and viewpoints to the north along recreational trails on DNR lands on Nestor Peak. *See generally* Ex. 21.00 at 15:5–7 (testimony of Dean Apostol); DEIS Pub. Comm. No. 476 (Gifford Pinchot Task Force) at 3; DEIS Pub. Comm. No. 117 (Chris Carvalho) at 1; DEIS Pub. Comm. No. 503 (Mary Repar); DEIS Pub. Comm. No. 519 (Friends) at 41–42; DEIS Pub. Comm. No. 524 (Sally Newell) at 2. However, not a single viewpoint from the north or northwest was ever modeled or analyzed.

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viewpoints. The Applicant's and County's arguments beg the question: if the Council cannot base its decision on the impacts from these viewpoints, then why did the Applicant select them in the first place?

The answer, of course, is that the Council is required to protect scenic views from all affected viewpoints—whether located inside or outside the National Scenic Area. The Council has correctly determined that while nothing in the Scenic Area Act protects the views of the Project site from these viewpoints, neither does the Scenic Area Act *prohibit* the protection of these views under *other laws*. *See* 16 U.S.C. § 544*o*(a)(10). The other authorities discussed above require the protection of scenic views, independent of the Scenic Area Act.

The County also argues that the Council's decisions and recommendations would impose a "buffer" or "setback" from the National Scenic Area boundary. County Pet. at 7–9, 12. The County is incorrect. A buffer or setback would prohibit wind turbines within a certain distance from the Scenic Area boundary. *See, e.g.*, WAC 463-60-333(3)(a) (discussion of "buffer widths" for wetlands). That is not the Council's recommendation. For example, the Council's Orders do not recommend prohibiting turbines D1 or F1, both of which are proposed to be sited *immediately adjacent* to the Scenic Area boundary. *See* Ex. 1.11c. The Council should reject the County's arguments regarding buffers and setbacks.[15]

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[15] If the Council or Skamania County wished to impose a setback or buffer from the National Scenic Area, they could do so, independent of any authority under the Scenic Area Act. For example, Wasco County requires all new wind energy facilities to be sited at least one-quarter mile away from the boundary of the National Scenic Area. Wasco County Land Use & Development Ord. § 19.030(F)(1)(c); *see also* Ex. 25.00r at 3:1–18 (rebuttal testimony of Michael Lang). That is not, however, what the Council has recommended here.

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B. The Council should reject the Applicant's arguments that the State Environmental Policy Act trumps the Council's jurisdiction to conduct an adjudication and ensure that the Project complies with all applicable laws.

The Applicant makes a number of confusing arguments that the Council's obligation to comply with the State Environmental Policy Act ("SEPA") somehow trumps the Council's obligations to conduct an adjudication on the Application and to ensure that the Project complies with all applicable laws, including the Siting Act and the Council's rules. *See* Applicant Pet. at 5:6–6:19.[16] The Applicant's arguments largely reiterate its prior untimely challenge to the Council's authority,[17] which the Council has already rejected by finding "no barrier to resolving [aesthetic] issue[s] in [the Adjudicative] Order." Order No. 868 at 19. The Council should reject the Applicant's renewed attack on Council jurisdiction.

As the Council has addressed extensively throughout these proceedings,[18] the Council must comply with *both* its SEPA mandate *and* its mandate to hold an adjudication and determine consistency with the Siting Act, the Council's rules, and other applicable laws.[19] The latter mandate includes the Council's responsibilities to address "the broad interests of the public" and to "ensure through available and reasonable methods . . . that the location and operation of

[16] Skamania County appears to make similar arguments, suggesting that the Council is bound by the FEIS and that the Council has no authority to deny the Project except under SEPA. *See* County Pet. at 10:3–21. For the same reasons as discussed below in response to the Applicant, the County is wrong on both counts.

[17] *See* Order No. 868 at 17 (noting that the "Applicant argues for the first time in its reply brief that consideration of aesthetic issues should be exclusively within the SEPA process").

[18] *See* Order No. 848 at 3 (Pre-Hearing Order No. 4); Order No. 850 at 4 (Pre-Hearing Order No. 6); Order No. 853 at 2 (Pre-Hearing Order No. 9); Order No. 869 at 3, 14.

[19] Friends continues to object to the Council's decision to conduct the adjudication prior to the issuance of the FEIS. *See* SOSA & Friends Objections to Prehearing Order No. 4 (July 8, 2010); RCW 43.21C.030(d) (The FEIS "shall accompany the proposal *through the existing agency review processes*.") (emphasis added). However, unlike the Applicant, Friends has never questioned the Council's authority to adjudicate issues pertaining to the Application pursuant to the Council's mandates.

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[energy] facilities will produce *minimal* adverse effects on the environment"[20] and will "preserve and protect the quality of the environment." RCW 80.50.010 (emphasis added); *see also* WAC 463-14-020 (expressly incorporating these statutory responsibilities).

Compliance with SEPA does not displace the Council's other mandates; in fact, SEPA itself recognizes that other mandates can and will apply. RCW 43.21C.050 ("Nothing in RCW 43.21C.030 or 43.21C.040 shall in any way affect the specific statutory obligations of any agency . . . to comply with criteria or standards of environmental quality."); *see also* WAC 197-11-330(3)(e) ("[T]he responsible official shall take into account [whether the] proposal may to a significant degree . . . [c]onflict with local, state, or federal laws or requirements for the protection of the environment.").

A primary thrust of the Applicant's argument appears to be that the Council's enabling mandate "cannot trump *later enacted* legislation—specifically SEPA." Applicant Pet. at 6:6–17 (emphasis added). In other words, the Applicant appears to be arguing that because SEPA was enacted later in time, it somehow impliedly repealed the Council's enabling legislation. The Applicant's argument is without merit. The plain language of the SEPA statute and rules address this very issue, acknowledging that decision makers must address other statutory and regulatory factors, including factors that require broader balancing judgments:

> "The policies and goals set forth in this chapter are *supplementary* to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties."

RCW 43.21C.060 (emphasis added).[21]

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[20] The Council's statutory requirement under RCW 80.50.010 to ensure "*minimal* adverse effects on the environment" (emphasis added) is more rigorous than the requirements of SEPA, which are focused on determining *significant* impacts. *See, e.g.*, RCW 43.21C.031.

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> "SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. *However, the environmental impact statement is not required . . . to contain the balancing judgments that must ultimately be made by the decision makers*. Rather, an environmental impact statement analyzes *environmental* impacts and must be used by agency decision makers, *along with other relevant considerations or documents, in making final decisions on a proposal*. . . . *SEPA does not require that an EIS be an agency's only decision making document*."

WAC 197-11-448 ("Relationship of EIS to other considerations") (first and third emphasis added, second emphasis in original). The Applicant's argument has no support in the SEPA statute, the SEPA rules, or established precedent. The Applicant's argument must, therefore, be rejected.

The Applicant also argues that the "only logical way" to ensure minimal adverse affects on the environment is through the SEPA process. *See* Applicant Pet. at 6:12–16. This argument should be rejected as well. Logic should dictate that the Council should use *both* the SEPA process *and* the adjudicative process to ensure compliance with the applicable law; otherwise, the adjudicative process would be rendered meaningless. In fact, in many ways, the adjudicative process subjects the Applicant to a higher and more objective level of scrutiny than is required under SEPA. For example, at the adjudication, the Applicant bears the burden to prove compliance with the Council's mandates and criteria, subject to the scrutiny of cross examination and rebuttal evidence. *See* Council Order No. 843 at 13 (Nov. 16, 2009).

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[21] *See also Bellevue Farm Owners Ass'n v. Shoreline Hearings Board*, 100 Wn. App. 341, 353 n. 27, 997 P.2d 380 (2000) (explaining that SEPA, like its counterpart the National Environmental Policy Act, is "'*supplemental* to the existing mandates and authorizations of all . . . agencies'") (emphasis in original) (quoting 115 Cong. Rec. 19,009 (daily ed. July 10, 1969)); *see also Bellevue Farm*, 100 Wn. App. at 354 n. 28 (citing multiple Washington court decisions that hold SEPA is supplemental in nature).

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Finally, under the Council's rules, while the responsible official for issuing the EIS is the Council Manager (*i.e.*, the Council Staff), WAC 463-47-051, the Council itself retains ultimate decision-making responsibilities, WAC 463-47-050 ("[T]he decisionmaker is the council."); *see also* WAC 197-11-758 (The decision maker is responsible for "substantive determinations," such as those concerning state policy). And because the Council retains decision-making authority under both the SEPA and adjudicative processes, it is not bound, in rendering its final decision, by Staff-prepared SEPA findings or recommendations. *See Quality Rock Products v. Thurston County*, 139 Wn. App. 125, 141, 159 P.3d 1 (2007) (Board of County Commissioners not bound by Mitigated Determination of Non-Significance when County's responsible official "issued the MDNS without access to most of the information that the hearing examiner and the Board ultimately based their decisions on."); *see also Bellevue Farm Owners Ass'n v. Shoreline Hearings Board*, 100 Wn. App. 341, 355, 997 P.2d 380, *review denied*, 142 Wn. 2d 1014, 16 P.3d 1265 (2000). ("The board did not err in considering other applicable state and local regulations when it denied the Association's substantial development permit based on deficiencies outside SEPA."). The Council made clear in its Recommendation Order that it relied on *both* the adjudicative and the SEPA records in rendering its final recommendation. Order No. 869 at 3. The Council's approach is consistent with *Quality Rock* and *Bellevue Farm*.

Here, the EFSEC Staff lifted the analysis of scenic impacts from the Application and placed it in the FEIS, with very few changes.[22] In effect, the SEPA analysis of scenic impacts was *prepared by the Applicant*. And not a single landscape architect was retained by the Applicant or included among the drafters, consultants, or agency review team responsible for the

[22] For example, *compare* DEIS § 3.9 *and* FEIS § 3.9 *with* Amended Application § 4.2.3.

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FEIS. *See* FEIS § 6.0 (list of preparers). In contrast, the adjudication involved testimony from *two* expert landscape architects, Dean Apostol and Jurgen Hess, who conducted their own analyses of the Project's scenic impacts and presented these analyses to the Council for use in its ultimate conclusions.[23] The Council also conducted its own site visit and viewpoint tour and prepared its own analysis of scenic impacts. *See* Order No. 868 at 6, 22–23. The Council was entitled to rely on this information in reaching its determinations about compliance with applicable law, and was not bound by information prepared by the Applicant that became part of the Staff-issued FEIS.[24]

C. The Council should reject the County's and Applicant's arguments that the Council does not have the power to recommend denial of specific turbines.

Skamania County argues that the Council does not have sufficient authority, standards, or evidence to recommend denial of specific turbines to avoid or minimize the Project's adverse impacts. According to the County, the Council's rules merely require a description of aesthetic impacts, and RCW 80.50.010(2) does not authorize the Council's recommendation. County Pet. at 4–5. The Applicant makes similar arguments. Applicant Pet. at 5–8. These arguments fail for multiple reasons.

As discussed above, RCW 80.50.010(2) is not the only authority requiring the Council to protect aesthetic and heritage resources. A number of other applicable provisions require the Council to avoid, minimize, and/or mitigate adverse impacts to the environment; protect the public interest; ensure aesthetically and culturally pleasing surroundings; and preserve important

[23] *See* Ex. 21.00; Jan. 5, 2011 Tr. at 565–68 (testimony of Jurgen Hess); Adj. Public Comm. Nos. 297, 398; Ex. 61.02.

[24] Many of Friends' comments on the inadequacies of the DEIS were ignored or not sufficiently addressed in the FEIS. *See generally* DEIS Pub. Comm. Nos. 519, 520, 522–531. The FEIS should be corrected and updated before the Council transmits a recommendation to the Governor.

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historic, cultural, and natural aspects of our national heritage. *See supra* Part II.A. Moreover, the Council received ample evidence specific to this Project demonstrating that it would cause significant adverse impacts to aesthetic and heritage resources.[25] This included substantial site-specific evidence from expert agencies and multiple leading experts in the field of scenic resource assessment.

Washington courts have held that environmental values, such as aesthetics, can be difficult to quantify, but that general directives to protect aesthetic resources are a sufficient basis for regulating development to prevent impacts. *See, e.g.*, *Bellevue Farm*, 100 Wn. App. at 355–59 (2000) (*citing Hunt v. Anderson*, 30 Wn. App. 437, 440–42, 635 P.2d 156 (1981) (affirming the denial of a building permit due to aesthetic impacts based on general protections against scenic intrusions); *Polygon Corp. v. Seattle*, 90 Wn. 2d 59, 66, 578 P.2d 130 (1978) (holding that environmental standards can be hard to quantify)).

In *Bellevue Farm*, the court held that a stated goal in a shoreline master program "[t]o assure the preservation of scenic and non-renewable natural resources and to assure the conservation of renewable natural resources for the benefit of existing and future generations"[26] provided a sufficient basis to deny construction of a dock because of its likely scenic impacts. 100 Wn. App. at 356. Here, just as in *Bellevue Farm*, the Council's organic statute and implementing regulations provide sufficient authority to recommend denial of specific turbines, turbine corridors, or even the entire Project.

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[25] *See generally* Order No. 868 at 19–24; *see also* Friends Adj. Op. Br. at 19–26; DEIS Pub. Comm. No. 519.

[26] This language is remarkably similar to the Council's mandate "[t]o preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment and other sources." RCW 80.50.010(2).

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In addition, as noted in the Council's Adjudicative Order, the Council has previously recommended modifications of wind energy projects to reduce scenic impacts. *See* Order No. 868 at 18. For example, the Kittitas Valley Wind Project was originally planned as a 150-turbine project, but the Council recommended approval of only 65 turbines in its initial recommendation to the governor. Council Order No. 826, at 18, 30–32, and 56. The Council explained that it balanced the need to address the project's scenic impacts on sixteen nearby non-participating residences against the public's interest in developing new sources of wind power. *Id.* at 32. Subsequently, after receiving feedback from the Governor, the Council eliminated 13 additional turbines, reducing the total number of turbines to 52. Council Resolution No. 328 at 1.[27]

As compared to Whistling Ridge, the Kittitas Valley Project involved the same regulatory standards, but very different facts in terms of the viewers who would be affected by the projects. In the Kittitas Valley case, the Council was primarily concerned with scenic impacts to only *sixteen residences*.[28] In contrast, the Whistling Ridge Project would affect the following viewers:

- *Hundreds* of residences in White Salmon, Underwood, Hood River, Mill A, Husum, Willard, and surrounding communities.[29]
- *Twelve* agritourism businesses, including several wineries, in close proximity to the Project that have expressed opposition based on scenic impacts.[30]
- *Thousands* of annual visitors to the Historic Columbia River Highway, which is a registered National Historic District,[31]
- *Tens of thousands* of annual travelers on State Route 141, the primary access route to the

[27] The Applicant mysteriously argues that "no turbine, much less turbine corridors, were eliminated from the Kittitas Valley project." Applicant Pet. at 3 n. 2. The Applicant is in error.

[28] Order No. 826 at 30–32; Resolution No. 328 at 1.

[29] *See* FEIS at figs. 3.8-1., 3.9-2.

[30] Adjudicative Pub. Comm. No. 395 at 2 (list of members of the Skamania County Agri-Tourism Association).

[31] *See* Order No. 868 at 16; Exs. 8.17c, 8.18c, 8.19c, 21.07.

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Lower White Salmon Wild and Scenic River and the Mt. Adams Recreation Area.[32]

- *Hundreds of thousands* of annual visitors to the Lewis and Clark National Historic Trail and the Oregon Pioneer National Historic Trail, which include Washington State Route 14, the Columbia River, and Interstate 84.[33]

- *Hundreds of thousands* of annual visitors to numerous recreation, tourism, commercial, and residential sites up and down the Columbia River Gorge in Washington and Oregon.[34]

These distinctions thoroughly support the Council's decision to recommend denial of turbine corridors for the Whistling Ridge Energy Project.[35] Indeed, the evidence for Whistling Ridge warrants denial of the *entire Project*, rather than only 15 of the proposed 50 turbines (*i.e.*, 30%). The aesthetic and cultural heritage impacts of the Whistling Ridge Project go far beyond those reviewed by the Council in prior cases, causing the public to weigh in against the Whistling Ridge Project in unprecedented numbers.[36]

Finally, in the unlikely event that RCW 80.50.010(2) and related authorities are determined to be too vague to implement, the solution should *not* be to disregard the applicable law and rubberstamp all applications, as recommended by the County and the Applicant.[37] Rather, the State should refrain from approving any applications until further standards can be adopted.

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[32] *See* DEIS at Appx. G-459.

[33] *See* Exs. 21.04, 21.05.

[34] *See* Friends Adj. Op. Br. at 19–26.

[35] The Applicant's irreverent argument that the Whistling Ridge Project would affect only "Oregon residents and commercial truck drivers," Applicant Pet. at 3, n. 2, callously disregards the legitimate interests of hundreds of potentially affected residences and businesses in Washington and the hundreds of thousands of people who visit both the Washington and Oregon sides of the Columbia River Gorge to experience its remarkable scenic and historic landscapes.

[36] A total of 1,390 written comments were submitted in the SEPA scoping, DEIS, and adjudicative processes for the Whistling Ridge Project. Of these comments, 1,299 were non-duplicate and expressed an opinion. Of these 1,299 comments, 1,115 (85.8%) were opposed to the Project or expressed concern, while only 184 (14.2%) expressed support. The most heavily cited concern was scenic impacts, expressed in 1,023 (78.8%) of the comments.

[37] *See* County Pet. at 4–7; Applicant Pet. at 5–8.

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D. The Council should reject the Applicant's and County's assertions that the Council must rely on the scenic impacts assessment prepared by the Applicant's consultant.

The Applicant repeatedly argues that the Council's recommendations are based on "subjective" analyses and that the Council must jettison these analyses and instead rely on the conclusions in the Application and FEIS, which were prepared by the Applicant's consultant Dautis Pearson. Applicant Pet. at 3, 4, 6, 7, 8. The County makes similar arguments. County Pet. at 6, 10, 12. Their arguments are wrong on multiple counts.

First, the Applicant has flip-flopped its position. Previously, the Applicant claimed that its own scenic impacts analysis was "subjective" and that even if this analysis had identified high scenic impacts, that would not necessarily justify removing turbines. Amended Application at 4.2-66. Now, the Applicant argues that Mr. Pearson's scenic impacts analysis is "objective" and that the Council must rely on his conclusions. Applicant Pet. at 8:6–18.

The Applicant is simply mistaken in claiming that Mr. Pearson's analysis is objective and reliable. Properly performed *objective* scenic impacts assessments are systematic, based on established methodologies, and can be independently confirmed.[38] Not only were Mr. Pearson's assessments *not systematic* and *not confirmed*, they were contradicted and discredited by every

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[38] "The scientific method comprises the following six step analytical process used to generate a theory or conclusion considered reliable by scientists generally: (1) observations of a phenomenon are made; (2) an explanatory theory is proffered; (3) observable hypotheses are generated from the theory; (4) studies are designed to test these hypotheses; (5) empirical test results are used to revise older theories or generate different, more reliable theories; and (6) the process repeats itself."
Moore v. Harley-Davidson Motor Co. Group, Inc., 158 Wn. App. 407, 241 P.3d 808, 813 (2010) (citing *Blackwell v. Wyeth*, 408 Md. 575, 971 A.2d 235, 239 (Md. 2009)).

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qualified expert who testified or commented on the Project.[39] The consensus among these experts is that the WREP would cause significant adverse impacts to scenic resources.[40]

Finally, the Applicant argues that the methodologies created by Mr. Pearson were vetted by an "interdisciplinary team."[41] However, the Applicant never identified who was on the purported interdisciplinary team, merely stating that they were all employees of his consulting firm, URS Corporation. Jan. 4, 2011 Tr. at 318:22–319:5.[42] Moreover, the involvement of an *inter*disciplinary team is largely irrelevant as compared to conclusions within the relevant field of expertise. Input from other experts in other disciplines, such as archeologists, biologists, or whoever else may have been involved with the Applicant's "interdisciplinary team," are irrelevant to a credible analysis of *scenic* impacts. The Applicant conceded that the scenic assessment methodologies for this Project have never been peer reviewed by any qualified

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[39] *See generally* Friends Adj. Op. Br. at 19–39; Friends Adj. Resp. Br. at 9–18. The qualified experts who have weighed in on the Project and on Mr. Pearson's scenic impacts assessment include Diana Ross, Lynn Oliver, Dean Apostol, Jurgen Hess, and Dan Wiley. *See generally* Exs. 21.00, 21.01, 21.02, 21.03, 21.04, 21.05, 61.02; DEIS Pub. Comm. No. 519, Ex. MM; Adj. Pub. Comm. Nos. 297, 398. Between them, these experts have more than one hundreds years of experience in preparing and reviewing scenic impacts assessments.

The Applicant makes the remarkable claim that Friends' positions on the scenic impacts of the Project are supported by only "one individual" (presumably a reference to Dean Apostol). Applicant Pet. at 8:14–16. Again, Mr. Apostol's conclusions about the impacts of the Project have been independently confirmed in the record by the conclusions of several other qualified experts.

[40] Friends Adj. Op. Br. at 19–26; Friends Adj. Resp. Br. at 16–17.

[41] Applicant Pet. at 8:10–13 (citing Jan. 4, 2011 Tr. at 299:6–8 (testimony of Dautis Pearson).

[42] The Applicant's only other proffered witness on scenic resource issues, Tom Watson, testified that he had no formal training in visual impact assessment methodologies. Jan. 4, 2011 Tr. at 224:9–17, 230:16–17. Instead, Mr. Watson's expertise is in preparing visual simulations and models. *See* Ex. 8.02 (resume of Tom Watson).

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expert, such as a landscape architect.[43] Mr. Pearson's newly created methodologies are neither time-tested nor validated by others in his field, and need not be followed for this Project.[44]

E. The Council should amend the legal description in the Draft SCA to prohibit turbines in the vicinity of proposed turbine C1.

The Council recommended prohibiting wind energy development in the A1 through A7 and C1 through C8 corridors, and required the Applicant "no later than the time for filing petitions for reconsideration [to] file legal descriptions of the affected land for inclusion in the Site Certification Agreement as territory prohibited from use for turbine towers or other Project structures." Order No. 869 at 13 & n. 23. The Applicant declined to comply with this requirement, responding instead that it "does not have the time to complete this work within the time for filing petitions for reconsideration" and that the Council's requirement "can be perceived as an attempt to undercut Whistling Ridge's legal rights to reconsideration." Applicant Pet. at 1 n. 1. The Applicant requested that the deadline for submitting the required legal descriptions be postponed until sometime "prior to execution of the Site Certification Agreement." *Id.*

The Council presumably chose its deadline to give the parties an opportunity to review the Applicant's legal descriptions and respond by the due date for responses to petitions. The Applicant's failure to comply with the Council's deadline deprives the parties of this

[43] Jan. 4, 2011 Tr. at 318:22–319:51; *see also* Applicant Adj. Op. Br. at 24–25; Friends Adj. Op. Br. at 26–31; Friends Resp. Br. at 9–18.

[44] "[W]hen a challenge to the scientific evidence alleges that it is novel, Washington courts apply the *Frye* standard, asking whether 'both the underlying scientific principle *and* the technique employing that principle find general acceptance in the scientific community.'" *Moore v. Harley-Davidson*, 241 P.3d at 813 (citing *City of Bellevue v. Lightfoot*, 75 Wn. App. 214, 222, 877 P.2d 247 (1994)). "General acceptance in the same scientific community may be established through empirical testing using the scientific method or by publication in a scholarly journal." *Moore v. Harley-Davidson*, 241 P.3d at 814 (citing *United States v. Tranowski*, 659 F.2d 750, 756 n. 11 (7th Cir.1981); *State v. Huynh*, 49 Wn. App. 192, 197, 742 P.2d 160 (1987); *Blackwell*, 971 A.2d at 250).

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opportunity. Friends requests an opportunity to respond to any legal description(s) submitted by the Applicant at a later date.

However, it may not be necessary for the Applicant to submit a legal description, because the legal description attached to the Draft Site Certification Agreement ("SCA") already includes parenthetical notes describing certain lands where there will be "no tower construction." *See* Draft SCA, Attachment 1, Part 2. Friends has reviewed the Council's legal descriptions and believes that, with one exception, they sufficiently describe the lands where the Council recommended prohibiting turbines. Friends recommends adding to the descriptions of lands where energy development should be prohibited the following land, located within the proposed "C" corridor in the vicinity of turbine C1:

- **Township 3 North, Range 10 East of the Willamette Meridian, Section 6:** The Northeast Quarter of the Southeast Quarter of the Southeast Quarter.

Friends also reiterates its request that the Council should add a condition of approval to the Draft SCA that would permanently prohibit wind energy development on the described lands and that would require the Certificate Holder to record deed restrictions for the affected lands within sixty days of execution of any SCA. *See* Friends Pet. at 23. Without such a condition, the Council's recommended approach of denying specific turbines (while approving others) could be only temporary.

Finally, Friends reiterates that the public and parties should be given an opportunity to review and comment on any future "micrositing plan" and any future proposal to relocate any proposed turbines outside of their respective proposed corridors. *See* Friends Pet. at 23–24, 44–46.

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F. The Project is inconsistent with local land use authorities.

As Friends and SOSA have explained in great detail, the Project is inconsistent with local land use authorities.[45] Now, Skamania County threatens to try to approve most of the Project (presumably the 43 turbines proposed on the Unmapped lands) in a single day:

> Skamania County zoning authorizes all but one turbine string outright. All the County has to do is issue building permits and much of the Project is permitted. One Action. One Day. Project approved.

County Pet. at 3. The County's argument comes as somewhat of a surprise, given the County's prior actions. After all, according to both the Applicant and the County, it was the County's idea that the Applicant should file an application with this Council for State approval, rather than seek approval from the County.[46] If the majority of the Project could be approved by the County in one day, why has the Applicant spent years pursuing site certification by the State?

The County's position is invalid. Privately owned wind energy facilities are not allowed on Unmapped, forested lands pursuant to the Comprehensive Plan, zoning ordinance, and moratorium ordinance. That is the very reason why the County pursued zoning amendments that would have allowed private energy development, and then, after abandoning the zoning amendments, recommended that the Applicant seek certification through the State's processes, whereby local land use authorities could be preempted.

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[45] May 7, 2009 Land Use Tr. at 28–31 (legal arguments of Nathan Baker); *Id.* at 31–43 (legal arguments of J. Richard Aramburu); SOSA's May 7, 2009 Land Use Consistency Comments (Comments of J. Richard Aramburu); Friends' May 7, 2009 Land Use Consistency Comments (Comments of Rick Till); Friends Land Use Op. Br; Friends Land Use Resp. Br.; SOSA Land Use Op. Br.; SOSA Land Use Resp. Br.; Friends Pet. at 2–12; SOSA Pet. at 21–30. Friends also adopts the arguments on land use consistency made by SOSA in its Response to Petitions for Reconsideration.

[46] Jan. 3, 2011 Tr. at 87–88 (testimony of Jason Spadaro); Jan. 11, 2011 Tr. at 1343–45 (testimony of Paul Pearce).

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Unfortunately, the Council's determinations that the Project is consistent with local land use authorities[47] only adds fuel to the County's claims that the County may approve the majority of the Project in a single day. The Council should reconsider its findings regarding land use consistency and should schedule a hearing pursuant to WAC 463-28-060 on whether the local land use authorities should be preempted.

G. The Council has not met the requirements of the Siting Act to determine whether the Project would supply abundant energy at reasonable cost to meet the needs of Washington citizens, and whether the Project would result in a net benefit under the Council's required balancing inquiry.

The Siting Act acknowledges the "present and predicted growth in energy demands in the state of Washington" and "recognize[s] the pressing need for increased energy facilities." RCW 80.50.010. In other words, the Siting Act assumes there is a demand for new energy sources in Washington State.

But whether each Project would *meet that demand* is another question, and it is a question that the Council must answer. Specifically, the Council must determine whether proposed Projects would "provide abundant energy at reasonable cost." RCW 80.50.010; *see also* WAC 463-14-020(3) (Council must determine whether each application for certification will "provid[e] abundant power at reasonable cost.").

SOSA has correctly pointed out that the Whistling Ridge Energy Project, if approved, would almost certainly sell its output to meet demand outside the State of Washington, and that if such a result occurs, any State approval of the Project will do *nothing* to provide abundant energy at reasonable cost to the citizens of Washington. SOSA Pet. at 16–18. Friends supports

[47] Order No. 869 at 4; Order No. 868 at 35–36.

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and adopts SOSA's arguments and its request for a condition of approval requiring the energy output of the Whistling Ridge Project to remain in Washington state.

In its Orders, the Council appears to have adopted a new test: whether a Project would "contribute to" the provision of abundant energy at reasonable cost. Order No. 869 at 6, 18. Setting aside for a moment the issues of "reasonable cost" and whether the energy output would remain in-state, won't *every project*, no matter how small, "contribute to" the provision of abundant energy? The Council's new test sets a bar that is so low as to make the test meaningless. The Council must consider whether each Project would actually provide abundant energy, not "contribute to" the goal of providing abundant energy.

SOSA also argues that the Council has failed to ensure the Project's energy output would be supplied at "reasonable cost," as required by the statute and rules. SOSA Pet. at 19–20. Indeed, the Council merely adopted conclusory findings that the Project would supply energy at reasonable cost, but without citing any supporting evidence or providing any explanation for its findings. Order No. 868 at 19; Order No. 869 at 18. Friends supports and adopts SOSA's request for the Council to revisit this issue and reach a determination as to whether the Project's energy output would in fact be provided at reasonable cost. This may require additional documentation and evidence to be provided by the Applicant.

Overall, the Council has not shown that it has satisfied the required balancing inquiry. After determining whether each proposed Project would supply the citizens of Washington with abundant energy at reasonable cost, the State must balance the energy benefits of the Project against its expected adverse impacts. To put it another way, the Council has previously stated that its overarching task in any certification process is to determine whether a proposed facility,

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at a particular location, "will produce a net benefit after balancing the legislative directive to provide abundant energy at a reasonable cost with the impact to the environment and the broad interests of the public." Order No. 843 at 23 (Nov. 16, 2009); *see also* Order No. 869 at 3; Order No. 826 at 52 (March 27, 2007); Order No. 814 at 36 (May 25, 2005); Order No. 768 at 2 (May 24, 2002). This comprehensive mandate flows directly from RCW 80.50.010, which directs the Council to "balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public." And this mandate is reflected in the Council's rules, which expressly incorporate the Council's statutory directive to minimize environmental impacts (including aesthetic impacts) and to balance these considerations against the benefits of increased energy production. *See* WAC 463-14-020.

Here, we know that the energy output of the Whistling Ridge Project would be relatively small,[48] and that its energy is not likely to be delivered in-state. On the other side of the balancing inquiry, we know that the Project would cause significant adverse impacts to cultural and heritage resources, wildlife, and local communities.

The Council does not seem to be addressing how the relatively small energy output of the Whistling Ridge Project factors into the balancing inquiry. All other things (including adverse environmental impacts) being equal, the balancing inquiry might result in a different outcome if the Project's power capacity were 200 or even 300 MW (rather than the expected capacity of 75 MW). Here, the small anticipated energy output of the Whistling Ridge Project simply does not justify its substantial environmental impacts, and thus, the Project should be denied.

[48] The proposed maximum capacity of 75 MW would make Whistling Ridge the second-smallest wind project in the State of Washington. Jan. 3, 2011 Tr. at 73:7–10 (testimony of Jason Spadaro). Further, the Applicant now argues that if the fifteen specified "A" and "C" turbines were removed from the Project, the Project's total capacity would likely be smaller than 75 MW. Applicant Pet. at 2.

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The takeaway point is that the Council has not articulated *how* it conducted its balancing inquiry, nor the results of that inquiry.[49] The Council should address these issues in any Order on Reconsideration.

H. The Council should reject the Applicant's requests to address the economic viability of the Project.

The Applicant argues that the Project would not be economically viable if the specified fifteen turbines were prohibited. Applicant Pet. at 2. However, the Applicant ignores the fact that the Council has held that the "economic viability of an applicant's project . . . is an applicant's business decision outside the scope of the Council's review." Order No. 868 at 15. The Applicant does not seek reconsideration of the Council's finding, nor otherwise assign error. Moreover, the Applicant has repeatedly argued in this proceeding that any information regarding the economic viability of the Project is outside the scope of the proceeding and inadmissible, and the Council has on many occasions sustained the Applicant's arguments.[50] The Council should reject the Applicant's sudden request to address the economic viability of the Project.

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[49] Although the Council has recommended denial of fifteen of the proposed fifty turbines, it has not done so in terms of the required balancing inquiry.

[50] In its Response to Petitions for Reconsideration, SOSA provides a detailed discussion of the Applicant repeatedly making these arguments, and the Council's rulings on them. Friends supports and adopts the arguments of SOSA on these points.

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III. Conclusion

The Council should reject the Petitions for Reconsideration filed by the Applicant, Skamania County, and the Klickitat County Public Economic Development Authority, and should grant the Petitions filed by Friends of the Columbia Gorge, Save Our Scenic Area, and Seattle Audubon Society. Furthermore, for the many reasons previously articulated in Friends' prior comments, testimony, and pleadings, the Application for site certification should be denied.

Dated this 14th day of November, 2011.

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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01 WHISTLING RIDGE ENERGY LLC WHISTLING RIDGE ENERGY PROJECT	CERTIFICATE OF SERVICE

I hereby certify that on the date written below, I caused delivery of electronic copies of the following documents to EFSEC by electronic mail, and delivery of the original and twelve paper copies of the same documents to EFSEC by hand delivery:

1. Cover Letter
2. Friends of the Columbia Gorge's Response to Petitions for Reconsideration

I further certify that on the same date, I caused delivery of one paper copy and one electronic copy of the above-listed documents by U.S. Mail and electronic mail, respectively, to each of the persons listed on EFSEC's official service list for the proceeding dated October 4, 2011 and posted on EFSEC's web site.

Dated: This 14th day of November, 2011.

/s/ Nathan J. Baker
Nathan J. Baker
Friends of the Columbia Gorge